

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON,
BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON, SNOHOMISH COUNTY,
AND PUGET SOUND KEEPER
ALLIANCE,

Appellants,

And

ASSOCIATION OF WASHINGTON
BUSINESS,

Intervenor,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-157

PCHB NO. 05-158

PCHB NO. 05-159

ORDER GRANTING PSA's FOURTH
MOTION FOR PARTIAL SUMMARY
JUDGMENT
(Issues 26, 29 and 33)

On October 2, 2006, Appellant Puget Sound Keeper Alliance (PSA) filed its Fourth Motion for Partial Summary Judgment on Issues 26, 29, and 33, as set out in the Pre-Hearing Order in this appeal. The Motion is opposed by Associated General Contractors of Washington and Building Industry Association of Washington (AGC/BIAW), Washington State Department of Ecology (Ecology), and Snohomish County (County).

ORDER ON SUMMARY JUDGMENT

PCHB NO. 05-157, 158, and 159

(1)

1 The Board hearing this matter was comprised of William H. Lynch, Chair, Kathleen D.
2 Mix, and Andrea McNamara Doyle. Administrative Appeals Judge Kay M. Brown presided for
3 the Board.

4 The following documents were received and considered in ruling on this motion:

- 5 1. PSA's Fourth Motion for Partial Summary Judgment, attached excerpts from
- 6 2. Deposition of Jeff Killelea, and Exs. 1-3;
- 7 3. Response of Snohomish County to PSA's Fourth Motion for Partial Summary
- 8 4. Judgment;
- 9 5. AGC and BIAW's Opposition to PSA's Fourth Motion for Partial Summary
- 10 6. Judgment and attached page from Pre-hearing Order, PCHB No. 02-162, 163, and
- 11 164;
- 12 4. Respondent Ecology's Response in Opposition to PSA's Fourth Motion for
- 13 5. Partial Summary Judgment;
- 14 6. Reply Supporting PSA's Fourth Motion for Partial Summary Judgment; and,
- 15 6. Tupper Dec., Exs. 1 and 2, Submitted in Support of AGC and BIAW's Opposition
- 16 to PSA's Third Motion for Partial Summary Judgment (hereinafter Tupper Dec.,
- 17 Ex. 1).

18 Based on the record and evidence before the Board on this motion and previous motions
19 for partial summary judgment, the Board enters the following decision.

20 Procedural Background

21 Ecology issued the Construction Stormwater General Permit for Discharges Associated
with Construction (Permit) on November 16, 2005. AGC and BIAW filed an appeal of the
Permit on December 15, 2005. The County and PSA filed appeals of the same Permit on
December 16, 2005. The appeals were consolidated, and the Association of Washington
Business (AWB) was allowed to intervene. A pre-hearing order was issued that established 36
legal issues in the consolidated appeals. Several of these issues, plus the general issue of PSA's
standing, have been addressed by this Board in previous orders. *See AGC/BIAW v. Ecology,*

1 Order on Summary Judgment, PCHB No. 05-157, 158, and 159 (Oct. 26, 2006), addressing
2 Issues No. 2, 3, 5, and 35, and the general issue of PSA's standing. *See also AGC/BIAW v.*
3 *Ecology*, Order on PSA's Third Motion for Partial Summary Judgment, PCHB No. 05-157, 158,
4 and 159 (November 27, 2006), addressing Issue No. 9.

5 Issues No. 26, 29 and 33 are the subject of this motion. These issues are:

- 6 26. Is Condition S9.C.'s incorporation of unspecified stormwater management guidance
documents or manuals unlawful or unreasonable?
7 29. Are the permit provisions for upset conditions in Condition G15. unlawful or
unreasonable?
8 33. Are the permit provisions for prohibition of bypass in Condition G26. unlawful or
unreasonable?

9 Facts

10 The Permit at issue regulates stormwater discharges from construction sites that result in
11 the disturbance of one acre or more. A key provision of the Permit is the requirement for the
12 permittee to develop and implement a stormwater pollution prevention plan (SWPPP). *Tupper*
13 *Dec., Ex. 1 Submitted in Support of AGC and BIAW's Opposition to PSA's Third Motion for*
14 *Partial Summary Judgment (hereinafter "Tupper Dec., Ex. 1")*. The permit requires that the
15 SWPPP must implement best management practices (BMPs) that are consistent with:

- 16 1. Stormwater Management Manual for Western Washington (most recent edition), for
17 sites west of the crest of the Cascade Mountains;
18 2. Stormwater Management Manual for Eastern Washington (most recent edition), for
19 sites east of the crest of the Cascade Mountains; or
20 3. Other stormwater management guidance documents or manuals which provide an
equivalent level of pollution prevention and are approved by Ecology; or
21

1 4. Documentation in the SWPPP that the BMPs selected provides an equivalent level of
2 pollution prevention, compared to the applicable Stormwater Management Manuals,
including:

3 a. The technical basis for the selection of all stormwater BMPs (scientific,
4 technical studies, and/or modeling) which support the performance claims for the
BMPs being selected; and

5 b. An assessment of how the selected BMP will satisfy AKART requirements and
6 the applicable federal technology-based treatment requirements under 40 CFR
7 part 125.3. ntify and describe the best management practices (BMPs) that the
permittee will implement to prevent erosion and sedimentation, and to reduce,
eliminate, or prevent stormwater contamination and water pollution.

8 *Tupper Dec., Ex. 1, pp. 22-23, Condition S9.C.*

9 No evidence has been presented in this case indicating that manuals have been reviewed
10 or approved for equivalence with Ecology's 2005 manuals. Ecology's process for determining
11 whether another agency's stormwater management manual is "equivalent" is one of internal
12 review and collaboration with the other agency. Ecology does not issue public notices of
13 determinations to approve such other manuals and does not accept public comment on its
14 equivalency determinations. *PSA's Motion, Ex. 2, pp. 5-8, Ex. 3, p. 4, Killelea Dep., Ex. 2.*

15 Condition G15. of the Permit provides an affirmative defense to an enforcement action
16 for an upset. It states:

17 Definition – "Upset" means an exceptional incident in which there is unintentional and
18 temporary noncompliance with technology-based permit effluent limitations because of
19 factors beyond the reasonable control of the Permittee. An upset does not include
20 noncompliance to the extent caused by operational error, improperly designed treatment
21 facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or
improper operation.

1 An upset constitutes an affirmative defense to an action brought for noncompliance with
2 such technology-based permit effluent limitations if the requirements of the following
paragraph are met.

3 A Permittee who wishes to establish the affirmative defense of upset shall demonstrate,
4 through properly signed, contemporaneous operating logs or other relevant evidence that:
5 1) an upset occurred and that the Permittee can identify the cause(s) of the upset; 2) the
6 permitted facility was being properly operated at the time of the upset; 3) the Permittee
submitted notice of the upset as required in condition S5.F; and 4) the Permittee complied
with any remedial measures required under this permit.

7 In any enforcement proceeding, the Permittee seeking to establish the occurrence of an
upset has the burden of proof.

8 *Tupper Dec., Ex. 1, p. 34, Condition G15. Upset.*

9 Condition S5.F. directs a permittee to immediately notify Ecology of a failure to comply
10 with permit conditions that may cause a threat to human health or the environment. *Tupper*
11 *Dec., Ex. 1, p. 16, Condition S5.F.1. Noncompliance Notification.*

12 Condition G26. addresses bypass. “Bypass” is the term used to refer to the “intentional
13 diversion of waste streams from any portion of a treatment facility.” Bypass is generally
14 prohibited, however Ecology cannot take enforcement action against a Permittee for bypass in
15 certain circumstances, including where the bypass of stormwater is “unavoidable, unanticipated,
16 and results in noncompliance of this permit.” A bypass based on unavoidability must be
17 followed by notification to Ecology “as required in Special Condition S5.F of this permit.” This
18 is the same notification provision that is applicable to upsets. *Tupper Dec., Ex. 1, p. 36,*
19 *Condition G26.A., p.16, Condition S5.F.1. Noncompliance Notification.*

1 Analysis

2 1. Summary Judgment

3 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
4 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
5 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The
6 summary judgment procedure is designed to eliminate trial if only questions of law remain for
7 resolution. Summary judgment is appropriate when the only controversy involves the meaning
8 of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l*
9 *Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d
10 1004 (1991).

11 The party moving for summary judgment must show there are no genuine issues of
12 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
13 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
14 summary judgment proceeding is one that will affect the outcome under the governing law.
15 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
16 and reasonable inferences must be construed in favor of the nonmoving party as they have been
17 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

18 Here, there are no contested issues of material fact related to PSA's motion for partial
19 summary judgment. The Board grants summary judgment to PSA on Issues 26, 29, and 33, and
20 orders that amendments shall be made to Conditions S9.C.3. and S5.F.
21

2. Incorporation of unspecified manuals or guidance documents

PSA challenges Condition S9.C.3. because it allows the use of SWPPPs that include BMPs from “[o]ther stormwater management guidance documents or manuals which provide an equivalent level of pollution prevention and are approved by Ecology.” *Tupper Dec., Ex. 1, p. 22*. PSA argues that this condition is vague, fails to adequately define the permit condition, and effectively provides for modification of permit conditions without adherence to permit modification requirements.

PSA contends the condition is vague because the equivalency requirement does not clearly identify *to what* the alternative guidance documents or manuals must be equivalent. Ecology responds that the context of Condition S9.C.3. (directly following Condition S9.C. 1. and 2.) makes it clear that the level of pollution prevention in any other document approved by Ecology must be equivalent to the level of pollution prevention to be achieved from the most recent editions of either the Stormwater Management Manual for Western Washington (Condition S9.C.1), or the Stormwater Management Manual for Eastern Washington (Condition S9C.2.). The Board concludes that the condition is not vague, but agrees that other arguments advanced by PSA have merit.

The current versions of the Western and Eastern Washington Stormwater Management Manuals were developed through a public process. Although they were not formally adopted pursuant to an appealable rulemaking procedure, adequate opportunity for public review and

comment accompanied their development and revision.¹ Moreover, through explicit incorporation of these manuals into this general permit (in conditions S9.C.1. & 2.), PSA and others have had the opportunity to challenge their adequacy. We are troubled by the absence of any similar process for the alternatives allowed by condition S9.C.3.

The problem with allowing equivalency of manuals not yet identified or approved, PSA correctly argues, is that when a manual is identified and approved by Ecology for use under the Permit, there is no notice, comment, or appeal period associated with the equivalency determination or approval. Nor is there any requirement under state law or regulation for any public involvement in the initial development of an alternative guidance document or manual. Once a manual is approved, applicants for coverage under the Permit can use BMPs from this newly approved manual without any requirement that they demonstrate the technical basis for the selected BMP(s). Nor is a permittee required to provide an assessment of how the BMP will satisfy the most current methodology that can be reasonably required for preventing, controlling, or abating pollutions associated with discharges (AKART). In contrast, such demonstrations for non-manual BMPs are required under Permit Condition S9.C 4. to be documented in a Permittee's SWPPP, which is publicly reviewable upon request.

Ecology contends that this does not constitute a permit modification because the permit establishes the performance requirements (*i.e.*, the level of pollution prevention that must be achieved by the BMPs) and this provision does not modify those performance requirements

¹ See Stormwater Management Manual for Western Washington, Ecology Pub. 99-11 through 99-15, August 2001, Foreward, Development of the Manual; Stormwater Management Manual for Eastern Washington, Ecology Pub. 04-

1 since, by definition, the alternatives must be “equivalent.” While that may be the intended result,
2 it is far from the tautology asserted by Ecology. The Board concludes that this approach creates
3 the potential for an unauthorized modification of the Permit under WAC 173-220-190(3)
4 (requiring public notice and opportunity for public hearing as provided in WAC Ch. 173-220 for
5 any permit modification where changes are proposed which lessen the stringency of effluent
6 limitations; 40 C.F.R. §122.62, §122.63, and §124.5.; *PSA v. Ecology*, PCHB 02-163 and 164,
7 Order Granting Partial Summary Judgment (June 6, 2003)(CL 34-38).² Even if it does not
8 result in lessening the stringency of the effluent limitations, the current permit scheme provides
9 no way for the public to confirm or ensure this. We conclude that authorizing replacement of
10 some or all of the BMPs presently required by this permit cannot be done without *some*
11 opportunity for public scrutiny or verification, such as that provided by the opportunity to review
12 the technical basis for the alternatives contained in a SWPPP under S9.C.4, or that provided
13 through the permit modification requirements of WAC Ch. 173-220-190(3) “(In all other
14 instances, the form of public notice and public participation, if any, shall be determined by the
15 department on a case-by-case basis according to the significance of the proposed action.)” To
16 conclude otherwise would allow the possibility, however remote it may be, that an alternative

18 10-076, Sept. 2004, For. 1-4; Ecology’s website (www.ecy.wa.gov/programs/wq/stormwater).

19 ² In this decision, the Board addressed the need for the opportunity for the public to comment on fundamental
20 changes to the 2002 Industrial Stormwater General Permit. The Board stated in Conclusion of Law 35: “WAC 173-
21 226-200(3)(f)(i) requires an applicant for coverage under the General Permit to certify it has complied with the
notice requirements of WAC 173-226-130(5). That provision requires, at a minimum, the applicant publish notice . .
. We believe proposed changes to fundamental deadlines and substantive requirements of the General permit are
similar in effect.” The Board went on to state, in Conclusion of Law 36, that when Ecology makes permit
modifications, it “Must comply with the procedures . . . including procedural safeguards, such as issuance of a draft
permit, public notice, and opportunity for public comment and appeal.”

1 guidance document or manual could be developed, approved as equivalent, and implemented on
2 a wide scale by the thousands of permittees that will be covered under this general permit, with
3 no opportunity for public review.³

4 AGC/BIAW argues that it is essential that the general permit allow the use of manuals
5 identified and approved in the future (including new additions of the two listed manuals).
6 Otherwise, they contend, the effect would be to limit the available BMPs to a static list. This, in
7 turn, would undercut the permit requirement that dischargers under the permit must apply
8 AKART, since pollutant control methods evolve and improve over time.

9 The Board agrees with AGC/BIAW that limiting the permit condition to the two
10 currently approved manuals is not the answer.⁴ However, allowing the use of revised or
11 alternative manuals (including new versions of the two listed manuals) after completion of the
12 permit modification process outlined in WAC 173-220-190 and 40 C.F.R. §122.62, §122.63 and
13 §124.5, would continue to accomplish the permit's goal of allowing for the improvement of
14 pollution control methods over time, as well as remedy its deficiency in public process. With
15 this modification, the Board concludes Condition S9.C.3. would be in compliance with state and
16 federal law.

18 ³ We note that the opportunity to review and challenge an equivalency determination made after issuance of this
19 general permit is not available through an appeal of a "coverage" determination issued to an individual applicant
20 pursuant to WAC 173-226-200, since coverage determination appeals are limited to the question of the general
21 permit's applicability or non-applicability to that individual discharger. WAC 173-226-190(2).

⁴ PSA argues that BMPs would not be limited to a static list because of the permit option to use the demonstrative
approach outlined in Condition S9.C.4. *Tupper Dec., Ex. 1, p.22*. However, the demonstrative approach is
generally viewed as a cost effective approach for large, complex, or unusual types of projects. The use of
stormwater technical manuals, either those identified in the permit, or other equivalent manuals, is the recommended
approach for typical development and redevelopment projects. *Tupper Dec., Ex. 2, p. 1-10*.

1 3. Reporting requirements for upsets and bypasses

2 PSA argues that neither the upset nor bypass provisions contained in the Permit comply
3 with federal law for the same reason: both provisions rely on the noncompliance notification
4 requirements contained in Condition S5.F. of the permit. PSA contends that these
5 noncompliance notification requirements are less stringent than federal law.

6 Condition S5.F. states:

7 In the event the Permittee is unable to comply with any of the terms and conditions of
8 this permit which may cause a threat to human health or the environment, the Permittee
shall:

9 1. Immediately notify Ecology of the failure to comply.

10 *Tupper Dec., Ex. 1, p. 16, Condition S5.F (emphasis added).*

11 As correctly noted by PSA, however, the federal noncompliance reporting provisions
12 require reporting within 24 hours of any unanticipated bypass or upset which exceeds the
13 effluent limitation in the permit, regardless of whether they may involve a threat to human health
14 or the environment. See 40 C.F.R. 22.41(l)(6)(ii). Requiring notification only in situations that
15 may cause a threat to human health or the environment is not as stringent as requiring
16 notification in any situation where the permittee exceeds an effluent limitation.

17 Ecology's response to this potential deficiency in the Permit is that Condition G12.
18 incorporates the requirements of 40 C.F.R. §122.41 and 122.42 by reference.⁵ Consequently,

21 ⁵ 40 C.F.R. 122.41 and 122.42 are the federal regulations that set out the conditions applicable to NPDES Permits. They include the 24 hour notification requirement contained in 40 C.F.R. §122.41(l) (6)(ii) for bypasses and upsets that exceed permit effluent limitations.

Ecology argues, to the extent that the reporting requirements under 40 C.F.R. §122.41(l) (6) (ii) are more stringent than the reporting requirements under Condition S5.F of the Permit, the permittee must comply with the more stringent reporting requirements.

While Ecology's argument may be technically correct, we find that the permit does not fairly apprise permit holders of the conditions under which noncompliance must be reported to Ecology as clearly as it could. In order to avoid any confusion regarding the applicable noncompliance notification procedures, the Board concludes that Condition S5.F. should be modified to explicitly reflect the overlay of federal regulations on the state notification procedures. With this appropriate modification, Condition S5F is consistent with state and federal law.

Based on the foregoing analysis, the Board enters the following

ORDER

1. PSA's Motion for Partial Summary Judgment on Issue 26 is granted. Ecology shall replace Condition S9.C.1. through S9.C.3. with the following language:

1. Stormwater Management Manual for Western Washington (*2005* edition), for sites west of the crest of the Cascade Mountains; *or*
2. Stormwater Management Manual for Eastern Washington (*2004* edition), for sites east of the crest of the Cascade Mountains; *or*
3. *Revisions to the manuals in S9.C.1. & 2., or other stormwater management guidance documents or manuals which provide an equivalent level of pollution prevention, that are approved by Ecology and incorporated into this permit in accordance with the permit modification requirements of WAC 173-220-190; or*

(changes highlighted in italics.)

2. PSA's Motion for Partial Summary Judgment on Issues 29 and 33 is granted.
Ecology shall add an additional requirement to Condition S5.F., consistent with this opinion, as follows:

F. Noncompliance Notification

In the event the Permittee is unable to comply with any of the terms and conditions of this permit which may cause a threat to human health or the environment, the Permittee shall:

1. Immediately notify Ecology of the failure to comply.
2. Immediately take action to prevent the discharge/pollution, or otherwise stop or correct the noncompliance, and, if applicable, repeat sampling and analysis of any noncompliance immediately and submit the results to Ecology within five (5) days after becoming aware of the violation.
3. Submit a detailed written report to Ecology within five (5) days, unless requested earlier by Ecology. The report shall contain a description of the noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and the steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

The permittee shall report any unanticipated bypass and/or upset which exceeds any effluent limitation in the permit in accordance with the twenty-four hour reporting requirement contained in 40 C.F.R. 122.41(l)(6).

Compliance with these requirements does not relieve the Permittee from responsibility to maintain continuous compliance with the terms and conditions of this permit or the resulting liability for failure to comply.

(additional language highlighted in italics.)

DONE this 4th day of January 2007.

POLLUTION CONTROL HEARINGS BOARD

William H. Lynch, Chair

Kathleen D. Mix, Member

Andrea McNamara Doyle, Member

Kay M. Brown, Presiding
Administrative Appeals Judge